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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 606.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,
Appellants,

vs.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

REPLY BRIEF FOR APPELLANTS.

SILAS H. STRAWN,
RALPH M. SHAW,
E. A. BOYD,
P. F. GAULT,
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Solicitors for Appellants.

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May it Please the Court:

One brief has been filed herein for appellees, the United States and the Interstate Commerce Commission, and a separate brief on behalf of appellee, the Hygrade Food Products Corporation. Both these briefs are lengthy, but the arguments presented may be briefly answered.

THE FACTS.

In both briefs some errors are made in stating the facts and the action taken by the Commission. At page 9 of

the Government brief it is said the Commission held that appellants have refused to deliver livestock at the Hygrade plant at the rates applying on such deliveries made at the stockyard. There should be added the further statement that appellants have not refused to make delivery of livestock at the Hygrade plant if the Hygrade Company would pay the charges found by the Commission to be applicable on such deliveries (R. 176).

At page 10 of the Government brief it is said that the Commission found the yardage charges of the Yards Company were collected without tariff authority, in violation of Section 6 of the Interstate Commerce Act. This is in error, as Section 6 of the Act is nowhere mentioned in the Commission's report or order. The conclusion is one of counsel, apparently drawn from the statement in the report (R. 31) that the Hygrade Company had paid charges found "inapplicable". Further, there is no finding by the Commission that any charges were inapplicable. At page 12 of the Government brief it is said that the Commission recognized the rule that consignees are entitled to a reasonable time in which to remove their shipments from the carrier's premises. No such rule is stated in the Commission's report.

At page 2 of the brief of the Hygrade Company it is said that the Hygrade plant is separated from the stockyard only by a proposed extension of Pershing Road or 39th Street. This is incorrect. As we pointed out at page 49 of our main brief, numerous tracks of the Chicago Junction Railway also lie between the stockyard and the plant of the Hygrade Company. At page 7 of the Hygrade Company brief it is said that the weighing done by the Yards Company is solely for the benefit of the railroads. This is not supported by the record, which shows (R. 129) that the Hygrade Company uses the scale weights secured by it from the Yards Company to check its freight bills. Weights at the stockyard are furnished to the railroads by the con-

signees who secure them from the Yards Company (R. 108, 154), but this is done under a separate arrangement.

THE JURISDICTION OF THE COMMISSION TO MAKE THE ORDER ASSAILED HEREIN.

Much space in both briefs filed for appellees is devoted to the proposition that the Commission had jurisdiction to make the order assailed in this case. The theory of appellees, although there is no finding to that effect, is that the Commission held the Hygrade Company entitled to free access to and egress from the property of the Yards Company in the case of all shipments delivery of which is taken by the Hygrade Company at the unloading pens. This asserted holding is sought to be justified by the argument that the stockyard is a facility of and a point on the rails of appellants; that appellants are required, at such a place, to permit a consignee to remove his property without charge additional to the freight rate; that such removal is a part of transportation and thus within the Commission's jurisdiction, and that there is nothing in the facts or law which relieves appellants from this obligation imposed by the Commission's order.

The argument that the stockyard is a facility provided by appellants on their own rails where they have the obligation of granting free egress on certain shipments of livestock, seems to be based on three asserted grounds. The first is that the Chicago railroads were the original incorporators and constructors of the Yards Company properties, and thus established the stockyard as their livestock delivery point in Chicago. The second is that by a course of dealing, extending over a period of almost seventy years, the railroads have constituted the stockyard as their livestock terminal in Chicago. The third is that appellants have no other points in Chicago where such deliveries can be or are made.

There is an obvious answer to each of these claims. It

is true that almost 70 years ago, $925,000 of the capital stock of the Yards Company was orginally subscribed by nine trunk line railroads serving Chicago (R. 147), but the record is clear that shortly after the Yards Company started operation, those railroads dispossessed themselves of their capital stock in the Yards Company, presumably because of their decision not to establish the stockyard as their own livestock delivery place in Chicago. It was testified that for more than 50 years no railroad company serving Chicago has had any ownership interest in the stockyard (R. 147). The fact is that during this period of more than 50 years the stockyard has been owned and operated by private interests and that no appellant has had any connection with or control over it.

With respect to the second asserted ground, appellees have given consideration only to those facts which suit their argument. It is true that appellants have in point of fact delivered livestock at the stockyard for many years, but as we have argued in our main brief, it is not an enterprise belonging to appellants. It is only an industry served by appellants. Appellant's tariffs show the stockyard as an industry on the Chicago Junction Railway. The only service offered is a delivery of livestock into unloading pens. The fact of appellant's deliveries at the stockyard cannot be separated from the equally important facts that appellant's tariffs limit their obligations to a delivery into the unloading pens, and that the ending of appellant's obligations at those pens has been acquiesced in by all parties for as long a time as the deliveries have been made. If, under all the facts, the practice of making deliveries at the stockyard over a period of years could create a legal status, then the legal status of appellants thus created would be such that they certainly have no obligations beyond the unloading pens.

Much is made by appellees of the statement of this Court in *Adams v. Mills*, 286 U. S. 397, 409, that the stockyard was in effect the livestock terminal of the railroads. As

we have argued in our main brief, this statement was made in connection with the determination by this Court of the obligation of consignees to pay the loading and unloading charges of the Yards Company, a burden which had been assumed by the railroads since the Yards Company had started in business. By reason of the long-existing practice, the stockyard might well be held to be the terminal of the railroads for the purpose of loading and unloading livestock consigned to the stockyard, but in this case the same circumstances on which the holding in the *Mills case, supra,* was based, justify a holding that the stockyard is not the livestock terminal of the appellants for the purpose of rendering any service to consignees after the placing of the animals in unloading pens.

With respect to the third asserted ground, the argument made reduces to the proposition that the maintenance by appellants upon their own rails of facilities through which livestock can be delivered without charge, does not relieve them of that burden on deliveries made at the stockyard. Considerable point is made of the fact that appellants introduced no evidence showing the adequacy of their individually owned facilities. But such proof was not necessary. There is no allegation in the complaint filed by the Hygrade Company with the Commission that those facilities did not exist, that they were inadequate, or that appellants decline to make deliveries through them. The only complaint made of them in the record was that they are not situated at points sufficiently convenient to enable the Hygrade Company to use them without incurring some additional expense. The maintenance of those facilities by appellants satisfies every requirement laid upon appellants by the decision of this Court in *Covington Stock Yards Company v. Keith,* 139 U. S. 128.

As we have argued in our main brief, their existence makes available to the Hygrade Company three methods of securing delivery of livestock consigned to it at Chicago. It may take delivery at the facilities maintained by appel-

lants, in which case it will be required to sustain the expense of removing the animals from those facilities to its plant. It may secure delivery of such animals at its plant, but in such case it must pay the switching charges of the Chicago Junction Railway found reasonable by the Commission in its report, and must also furnish those facilities such as scales, unloading chutes, etc., which it does not now have.

It also has the alternative of a delivery through the Stock Yard. Such a delivery relieves it of the necessity of any further transportation of the animals by truck or otherwise, and relieves it of switching charges and the expense of maintaining facilities of its own. Such facilities are supplied by the Yards Company and for their use the Hygrade Company has hitherto paid the yardage charges of the Yards Company. Yet the decision of the Commission herein affords to the Hygrade Company the right to secure the delivery most convenient to it at no expenditure whatever. Appellants and the Yards Company are required in effect to deliver livestock into the pens of the Hygrade Company, that being the result of the order made.

The entire argument advanced by appellees reduces to the proposition that under the law each of the 79 public stockyards in the country are facilities of the railroads transporting livestock to such stockyards. Their position seems to be that such public stockyards, not owned or controlled by railroads nevertheless become, in course of time, facilities of the railroads, because the conveniences which they supply are such as to cause a large use to be made of them by shippers. If such a theory is true in this case, it is true in the case of every other public stockyard. Thus, the railroads would be required to assume the expense of supplying public stockyard facilities on all shipments of livestock, even though they have facilities of their own which have hitherto been considered as sufficient to discharge all their legal obligations. Appellees assert that this obligation has always existed, even though never as-

serted by anybody, and that the power of the Commission exercised in this case, has existed since the enactment of Section 1 (3) of the Interstate Commerce Act. Such an argument ascribes to Congress, in enacting the Interstate Commerce Act and amendments thereto, an intent which, had it existed, would surely have been plainly declared in the statutes and would not have been, as said by this Court in *United States v. Pennsylvania R. R. Co.*, 242 U. S. 208, 229:

> "ambushed in obscurity and suddenly disclosed by construction to turn accepted custom into delinquency, a construction that could be disputed and was disputed."

In that case, as in this, the majority of the Commission consisted of only one more than the dissenting minority; and there, referring to the position of the minority, this Court said, at page 232:

> "Well might they have recoiled from going to such extreme upon doubtful implication and have been impelled to declare, as they did declare, that if such power was given it logically and necessarily extended to every facility of transportation."

And, as we have argued, the contrary view is plainly indicated by Section 15 (5) of the Act. We do not contend, as stated by appellees, that Section 15 (5) is a limitation upon a previously existing obligation of appellants, but that it was a definite extension of that obligation. The entire argument of appellees is built upon the premise that the Yards Company, operating a public stockyard, is nevertheless a facility of each appellant at which each appellant has the same obligations with respect to delivery as at yards of its own. Since the premise is false, appellees' argument may not prevail. We submit that the only conclusion to be drawn from the evidence and the law is that the Yards Company, in furnishing the service dealt with

in the Commission's order, is acting not as agent of appellants in performing a transportation service, but in its own behalf as a public stockyard, and that as such, neither its services nor its charges therefor are subject to the Commission's jurisdiction.

THE VALIDITY OF THE COMMISSION'S ORDER INSOFAR AS IT REQUIRES APPELLANTS TO FURNISH SPECIAL FACILITIES FOR USE BY THE HYGRADE COMPANY IN REMOVING ITS LIVESTOCK FROM THE STOCKYARD.

In the brief for the Government, it is said at page 100 that the order does not impose upon appellants the requirement that the Hygrade Company be permitted the use of the viaduct or other special facilities owned by the Yards Company in removing its animals from the stockyards. If this were so, we could not complain of the order on this ground. But we direct the Court's attention to the fact that the Commission must have intended to grant to the Hygrade Company the free use of these special facilities, since reparation is awarded to it on all shipments, delivery of which was taken by it at the unloading pens and which were thereafter removed from the stockyards by the use of the viaduct in question.

In the brief of the Hygrade Company it is said (page 24) that this point is not included in appellants' assignment of errors and should not, therefore, be considered here. This is an error, as appellants' assignment of errors (R. 66) and statement of points relied upon (R. 186) assigned as error of the lower court the finding or assumption of that court that the record before the Commission was sufficient to support the order made by the Commission. There was no evidence before the Commission justifying the requirement of the order that these special facilities be made available to the Hygrade Company and, this being true, the assignment made was surely sufficient.

The only further statement of appellees on this matter is that a facility necessary to afford to the Hygrade Company free egress from the stockyard is not a special facility. But, as we have argued in our main brief, the use of this viaduct is not necessary to afford to the Hygrade Company free egress from the stockyard. It only makes that egress more convenient and less expensive to the Hygrade Company, but more expensive to appellants. Such egress, however, could be afforded even though the viaduct was not in existence, and can now be supplied without the use of the viaduct.

THE FAILURE OF THE COMMISSION TO MAKE NECESSARY FINDINGS.

In both briefs filed by appellees it is claimed that the Commission made findings sufficient to support its order. The findings referred to in both briefs are, for the most part, made by counsel and are not contained in the Commission's report. Thus in the brief of the Government it is insisted that there was a condemnation of the yardage charges of the Yards Company under Section 6 of the Interstate Commerce Act. This section of the Act is nowhere mentioned in the report or order of the Commission. On the other hand, the theory of the Hygrade Company is that the Commission made its order under Section 1 (6) and 15 (1) of the Act. (p. 66 of Hygrade Company brief.)

The theory now held by the Hygrade Company is the one advanced by the Commission in the District Court (R. 56) but apparently abandoned by it in this Court. This difference of opinion between the supporters of the order as to the basis upon which the Commission has proceeded is indicative of a major defect in the order. When those supporters of the order cannot themselves agree upon the theory upon which it is made, it would seem that it does not meet the standards of certainty prescribed by this Court.

It is unnecessary to deal in detail with the argument of

appellees on this point. It is sufficient to say that they have assumed the findings which the Commission should have made but did not make. They have assumed that the Commission acted under various provisions of the Act not mentioned in the report; that it made findings as to what was transportation; that the practice condemned was unreasonable; that it had jurisdiction and the Secretary of Agriculture did not; that a determination of the status of the Yards Company was unnecessary. We submit that the burden was on the Commission to state these conclusions, and that they cannot be supplied through inferences of counsel. The Commission has said many things in its report but not with the "simplicity and clearness" which would enable anyone to tell what it has done. Its advocates have apparently been unable to agree on the point, and the parties are left "to choose between conflicting inferences". *U. S. v. C. M. St. P. & P. R. Co.*, No. 379, October Term, 1934, decided March 4, 1935. We submit that the judgment of the lower court should be reversed and the Commission's order set aside.

Respectfully submitted,

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